SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted]99

JANE LEVIN, on Behalf of Herself and All Others Similarly Situated,

Petitioner,

and

MATILDA BURGER, *et al.*,

Common Stockholders-Intervener-Plaintiffs,

and

SAMUEL MEHLMAN, on Behalf of Himself and All Others Similarly Situated,

Preferred Stockholder Intervener-Plaintiffs,

vs.

THE GREAT WESTERN SUGAR COMPANY, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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No. 1360

JANE LEVIN, on Behalf of Herself and
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Common Stockholders-
Intervener-Plaintiffs,

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SAMUEL MEHLMAN, on Behalf of Himself and
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Intervener-Plaintiffs,

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THE GREAT WESTERN SUGAR COMPANY, *et al.*,

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents pray that the petition for a writ of certiorari be denied.

Counter-Statement of Questions Presented

Petitioner's statement of "Questions Presented" is so violently contradictory of the findings of fact, as found by the trial judge and unanimously approved by the Court of Appeals, that the Petition seems hopeless, unless it harbors a hope that this Court will retry the case *de novo*.

Petitioner's Question #1 assumes that a failure by the defendants to comply with their fiduciary obligations was established, but both lower Courts disagreed with Petitioner and found that there had been no breach of fiduciary obligations.

Petitioner's Question #2 is premised on the proposition that the proxy statement was deficient; in fact, both lower Courts found it to be a full, fair and complete disclosure of all material information. Moreover, as will be discussed more fully hereinafter, there is no similarity between the instant case and *Mills and Susman* v. *The Electric Auto-Lite Company,* 403 F. 2d 429 (7 Cir. 1968), in which this Court recently granted certiorari (89 S. Ct. 1470, 4/21/69).

Petitioner's Question #3 assumes a disparate and unfair allocation of benefits to the parties in the merger: in fact, both lower Courts found the allocation to be fair and beneficial to all interested parties.

Petitioner's Question #4, in effect, asks this Court to determine whether the claims she made, but failed to prove, violate New Jersey law. Regardless of the deference which this Court normally extends to the judges of the region with respect to local law, Question #4 asks this Court to express an opinion on a hypothetical case.

Petitioner in reality is seeking a third hearing in a third forum; nothing more is involved here than Peti-

tioner's request to try out her view of the facts on this Court.

Counter-Statement of the Case

Introduction —

A detailed Counter-Statement of the Case is necessary because Petitioner has selectively stated only those facts which Petitioner regards as helpful to her position. Because of Petitioner's censored statement, a more detailed reference to the facts of record is required, particularly because, as the Court of Appeals stated (Petition 3A), the inferences to be drawn from the facts are important.

A more complete factual statement is also necessary to correct some unwarranted assumptions which form the foundation of Petitioner's arguments to this Court. At pages 17 and 23 of the Petition, Petitioner attempts to turn factual questions into legal questions, thereby hoping to make her Petition more appealing to this Court. On page 17 of the Petition, Petitioner seeks to change the decision of the Court of Appeals as to defendants' conduct from the factual evaluation that it was into a legal determination.

The same can be said of Petitioner's argument on page 23 with respect to the proxy statement. In addition, Petitioner's argument is founded upon the premise that defendants' conduct was culpable, when in fact both lower Courts found to the contrary.

The case involves Petitioner's challenge to the merger of The Colorado Milling & Elevator Company and The Great Western Sugar Company. Petitioner claims that the terms of the merger were unfair to the common stockholders of The Great Western Sugar Company, and that the directors of both merging corporations violated fiduciary duties owing to those stockholders. The District

Court and the Court of Appeals rejected both claims as not supported by the facts. A detailed summary of the facts follows.

Statement of Facts

In December 1964, defendant William M. White, Jr. (White) was sought by and, at the unanimous request of its Board of Directors, became a director of defendant Colorado Milling & Elevator Company (Milling) (784a).*

Commencing in the fall of 1965, White began to purchase substantial amounts of Milling stock, which sold in the fall of 1965 for $26 per share (659a-660a). By January 1966 the bid price of Milling stock was $45 (Exh. DCM-3, p. 13, 21b, 1299a). The growth orientation which White supplied to Milling paralleled that significant increase in investor confidence (Exh. P-3, p. 4, 111a, 1461a).

Great Western Sugar Company (Sugar) and its operations were not strangers to White. His great-grandfather was one of Sugar's founders, and his grandfather and father served as members of its board of directors for many years (916a).

Sugar had an unusual capital structure. Under its charter each of the 150,000 shares of preferred stock had one vote toward the election of directors, while each of the 1,800,000 shares of common stock had 1/12 of a vote. However, since one share of Sugar preferred stock cost far less than 12 shares of common stock, voting control

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* References are to the Appendices filed with the Court of Appeals. References followed by "a" (*e.g.* 784a) are to Petitioner's Court of Appeals Appendix; references followed by "b" are to Respondents' Court of Appeals Appendix. Numbers preceded by "Tr." refer to pages of the transcript of testimony.

would be available through the preferred stock at far less cost than through the common stock.

White first met John Bunker, Sugar's president, at an informal luncheon meeting in the fall of 1965 (914a). White and Bunker had a broad and general discussion of the business problems of running a food processing company, either a flour company or a sugar company. They discussed the advantages of an aggressive policy stance in a food company as opposed to a conservative policy (712a), and they agreed that White's position in a company (Milling) which was committed to a program of expansion was less frustrating than Bunker's position in a company (Sugar) whose Board of Directors had no such interest (712a-713a) and was hesitant to accept new ideas. White commented casually, and Bunker agreed, that it would indeed be an intriguing and interesting idea if the two companies were "together" so that they could work together. *White suggested that Sugar buy Milling,* but the suggestion got no further (713a).

In February 1966 White conceived the idea of Milling making a tender offer for Sugar stock.

A memorandum prepared to support an application for financing a tender offer described Milling and the broadening of its over-all goals within the recent past. It described Sugar in detail, its capital structure and its operations and the sugar industry in general. The memorandum outlined a possible method of combining Milling and Sugar, but it stated (Exh. P-14, Tr. 470, 1482a):

> "Even when we [Milling] control the Board of Y [Sugar] we will not have the power to force a merger, as the statutes of New Jersey, where Y is chartered, require voting by classes on mergers and certain other major structural changes. However, it is our belief that if the merger route is se-

lected the terms of the merger should be fair to the stockholders of both companies. In addition to a merger, a purchase by one company of the assets of the other is also a possibility."

Though the memorandum indicated that Milling was confident of success even if Sugar management opposed the tender offer, White testified that Milling later determined that it would not make the tender offer if it were opposed by Sugar (720a).

Financing was arranged. White approached the full Executive Committee of Sugar (Messrs. Frank A. Kemp, Chairman of the Board of Sugar, Dorsey, Oxnard, White Sr., and Bunker) to discuss the proposed tender offer. Mr. M. B. Holt, Sugar's general counsel, was also present (918a). Sugar's unique capital structure and the attributes of Sugar's preferred stock were discussed (919a). The Executive Committee was concerned about the possibility of liquidation because of an earlier approach by a financier who had secured control of and then liquidated a company in the food industry, but White specifically stated that if Milling secured a controlling interest in Sugar it had no intention of liquidating Sugar (925a). The Sugar management then concluded that it would not oppose the tender offer (926a), and the tender offer was made to the public. It was successful, Milling acquiring 319,462 of the 1,800,000 outstanding common shares of Sugar and 114,904 of the 150,000 preferred shares of Sugar, or about 47% of the voting power in elections to Sugar's Board. However, since New Jersey law then gave each share of stock one vote on a merger proposal, Milling's acquisition entitled it to only 22% of the voting power on a merger proposal (Exh. DCM-5, p. 2, 25b, 1353a). Under New Jersey law then in effect, a merger would not become effective until approved by 66⅔% of all outstanding shares.

In discussions between Milling and Sugar management, it was agreed that there should be a single list of nominees for election to the Sugar Board at its annual meeting on June 1, 1966 (751a-752a). Milling, with 47% of the voting power for directors, could have, as a practical matter, elected all the directors, but agreed that there should be some old directors and some new directors; that Sugar management and Milling management would agree to all nominees; and that Milling would not present any nominee that was not acceptable to Sugar (752a). It was then further agreed that all five members of the Executive Committee of Sugar, Messrs. Kemp, Bunker, Dorsey, Oxnard, and White, Sr., should continue on the Board (753a). Milling then suggested six nominees, who were acceptable to Sugar, and this eleven-man management slate was elected at the June 1, 1966 annual meeting (Exh. DCM-5, p. 3, 25b, 1354a).

Bunker testified that White was a very active and helpful director of Sugar. Bunker and White had numerous discussions about Sugar's business (930a). They agreed that Sugar, although a well-run and well-managed company, was a very conservatively-managed company, and had not taken advantage of its financial position in the business community or in its own industry (931a). Bunker testified that he had tried to inject new and progressive ideas into the company, but had not been successful in doing so. The new Board, with Milling designees, was immediately helpful in the establishment of a broader base within Sugar's own industry by authorizing the construction of a new beet-sugar mill (931a-932a). This was the first new mill constructed by Sugar since 1932 (Exh. DCM-5, p. 19, 25b, 1370a).

A merger of Milling and Sugar was first discussed by representatives of management of the two companies

(specifically Bunker and White) at a meeting in New York in September 1966 (789a, 932a). White told Bunker that it was Milling's desire that if a merger should take place, the company should be a dynamic, active, growing organization, operating primarily within the food business (791a-792a).

Bunker told White that insofar as Sugar's common stockholders were concerned, by and large they were small holders primarily interested in the dividends paid on their shares and that accordingly any merger plan would have to protect their dividend income. Bunker also suggested that because the common stock was widely held, principally by individuals and small estates and trusts, the Sugar common stockholders in a fair exchange should receive at least the value that Milling had been willing to pay in its tender offer, i.e., $44 (932a-933a). Bunker also said that Sugar's common stockholders should have some equity interest in order to participate in any future growth of the corporation (934a). White at that time said he was thinking that, on an exchange, the Sugar common stockholders might each be given the right to select his own package, i.e., all preferred stock, or all common stock, or a combination of preferred and common stock (934a). Bunker felt that such a proposal was not easily presented in a proxy statement, and he preferred that there be a single package of preferred and common stock without the stockholders having a choice as to the composition of the package (934a-935a, 793a-796a).

Thereafter, Bunker and White returned to Denver and jointly reported the results of their meeting to Messrs. Dorsey and Kemp. At that meeting White urged that the Sugar Board or its Executive Committee designate an individual or a committee to negotiate the terms of a merger on behalf of Sugar. At the next Sugar Board

meeting in September 1966, Kemp stated that Bunker should carry on the discussions with Milling (957a).

Milling retained Standard Research Consultants, Incorporated (Standard Research), a subsidiary of Standard & Poor's Corporation, a leading financial and investment analysis firm in New York City. The trial judge found Standard Research's credentials "impeccable" (Petition 37A).

Standard Research's mission, expressed in a letter agreement dated September 21, 1966 (Exh. P-1, 105a, 1456a) was to make a study of the operations of both Milling and Sugar covering over-all financial and operating histories, as well as earnings, dividends, and market prices of the securities of each company. On the basis of such a study, Standard Research was then to recommend one or more merger plans mutually fair and agreeable to the several classes of stockholders involved. It was understood that Milling was to be the surviving corporation in a merger, the words "dominant" and "surviving" being used interchangeably in the letter agreement (104a).

Standard Research first prepared and discarded two trial proposals, which it found to be unfair to both Milling and Sugar (167a-170a). Then it came up with a merger proposal which it approved as a fair and equitable basis for a merger. The proposal satisfied Bunker's criteria of dividend protection, increased market value, and continuing equity interest.* White transmitted it to Bunker by letter dated October 4, 1966, suggesting that Bunker refer the proposal to Sugar's financial advisers,

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* This proposal provided for a merger of Sugar into Milling, with each share of Sugar common stock being exchanged for a package of one share of a new Milling preferred stock with a dividend of $1.75, and 3/10 of a share of Milling common stock.

Dillon, Read & Co. Inc. (Dillon, Read) for their analysis. In his letter White stated:

> "I am sorry that Great Western's representatives were unable to join us this week for discussions regarding the possible combination of the two companies. In lieu of a meeting, I forward this letter. It is addressed to you as head of Great Western's negotiating team, based on the authority delegated to you at the last meeting of the Great Western Board of Directors.
>
> In view of its position as a controlling stockholder of Great Western, Colorado Milling is particularly concerned with the fairness to Great Western's other shareholders of any proposed terms of merger. We feel that the fairness of the proposed exchange ratios must be established before other details of the merger can be fruitfully discussed. . . ." (Exh. P-63, 1099a, 1520a)

Bunker transmitted the Standard Research proposal to Dillon, Read and asked them to begin reviewing it (938a). Dillon, Read reported that it believed that the terms of this Standard Research plan (the "first" or "original" Standard Research plan) were "in the ball park" and would be acceptable with some improvement (944a).

When Bunker advised White that Dillon, Read had some reservations as to the fairness of the Standard Research plan, White suggested that Standard Research and Dillon, Read attempt to resolve their differences in a joint meeting (798a-799a).

Such a meeting was held and Dillon, Read made some general observations regarding the terms of the merger. One was that an exchange of debentures for the Sugar preferred stock was more desirable than the Standard

Research suggestion of Milling preferred stock for the Sugar preferred stock. This suggestion was ultimately adopted (401a-402a). Another was that the Sugar common stockholders did not get sufficient interest in the surviving company for their contribution to it. Dillon, Read indicated that a greater interest could be given in many different ways—higher dividends or market value or a greater share of the earnings or some combination of those factors (403a-404a).

When White learned that the Dillon, Read/Standard Research meeting had not resolved their differences of opinion, he asked Bunker to have a meeting of the principal officers of Sugar with representatives of Dillon, Read and of Milling (799a). Such a meeting was held. White told the meeting that Milling desired a mutually fair and satisfactory merger and that he hoped that some kind of negotiating process would lead to such a merger (800a). White felt that the premium being given to Sugar's stockholders, in the form of securities having a greater market value than the market value of the Sugar stock, made the Standard Research proposal fair (407a). Dillon, Read felt there was "just a little difference of opinion" (406a), but acknowledged that in evaluating a security exchange, sometimes increased market value is more important and significant than earnings and dividends (407a). Dillon, Read also acknowledged that while some people in its business, in evaluating a securities exchange, would attach greater weight to earnings and dividends than to market value, others might consider market value more important (409a). Most significantly, however, Dillon, Read indicated that in arriving at this sort of opinion, the weight to be given a particular factor "depends a good deal on which side you are on" (409a).

Representatives of Sugar and Milling met again two days later. White reviewed the image of both of the corporations (947a), spoke of his plans for the new company (412a), and asked that the Sugar representatives either accept or reject Milling's proposal or make a counter-proposal. Dillon, Read repeated its earlier suggestion as to debentures for the Sugar preferred stock and also suggested that there might be some sort of "multiple choice" in exchange for the common stock (947a). This of course was what White had suggested to Bunker in their early meeting in September 1966, though Bunker then rejected it as unworkable (934a-935a).

Because of Dillon, Read's suggestion and because Kemp had expressed a desire not to receive preferred stock for his Sugar common stock, White went back to his office and incorporated in some simple work sheets his original September suggestion to Bunker (an alternative choice plan in which the Sugar common stockholder could have either common stock or preferred stock or a combination of both in the merged company) (801a; 949a; 413a). White delivered the work sheets to Dillon, Read, stating that this was a good-faith suggestion by Milling and that it was not Milling's desire to present this as a specific proposal but rather to present it as an approach to which Dillon, Read could attach values if they chose to use the suggestion for negotiation purposes (801a). White asked Dillon, Read to reply whether they thought the concept was feasible and if they did, to state appropriate values (801a-802a). Dillon, Read never made any response to that proposal (802a) even though they promised to work on it overnight and respond to White with Dillon, Read's views (949a) and even though on that night of October 26th, Dillon, Read did work up two possible plans of exchange revolving around the choice con-

cept (476a). But those alternatives were never presented to Milling.

On the morning of October 27th Bunker arranged to have lunch with White that day (951a). At lunch, despite the pendency of the "choice" idea, Bunker proposed that Sugar buy from Milling the Sugar preferred stock which Milling owned (952a). White's response was that Bunker should make that a formal proposal and submit it to White and that White would take it to the Milling Board for consideration (954a).

Bunker's proposal to repurchase Milling's Sugar stock was never formally submitted to Milling because that proposal was emphatically rejected by Kemp when Bunker told Kemp that he had made that proposal orally to White (955a). Kemp then specifically relieved Bunker of responsibility and authority for any further discussions with Dillon, Read or with Milling with respect to a merger (1089a-1091a).

White's reaction to Bunker's luncheon proposal was primarily one of dismay and confusion (804a, 805a). It seemed contrary to the nature of Dillon, Read's assignment and Bunker's assignment from the Board of Directors or from Kemp. White did not then know that Kemp had specifically forbidden both Dillon, Read and Bunker to negotiate the terms of a merger. When neither Dillon, Read nor Bunker had responded to his proposal for a different form of transaction or made any suggestions whatsoever as to a feasible form of transaction, White returned to Standard Research and told them to revise and improve their plan, attempting to eliminate those objections which Dillon, Read had made (805a).

Standard Research undertook that assignment and shortly thereafter suggested another plan (the Standard

Research "revised plan") (Exh. DCM-3, 21b, 1281a-1322a). That plan contemplated that each share of Sugar common stock would be exchanged for a package consisting of one-third of a share of Milling common stock and one share of Milling preferred stock with a dividend of $1.80. In relation to the Standard Research original plan, this increased the Sugar common stockholder's equity participation by 10 per cent and increased the dividend on the preferred stock by 5 cents. The Standard Research revised plan incorporated Dillon, Read's suggestion respecting the exchange for Sugar's preferred stock, proposing the issuance of debentures (rather than Milling preferred stock) for Sugar preferred stock.

The Standard Research revised plan was submitted to the Sugar directors at a meeting of the Sugar Board in New York City on November 21, 1966 (958a). At that meeting it was unanimously decided that Dillon, Read's relationship to the proposed merger should be suspended and that Dillon, Read should not be asked to participate further until there was a fresh look by a newly-chosen investment banking firm, after which the Board would direct an assignment to Dillon, Read (828a, 829a). Dillon, Read was not fired by Sugar (972a) and its status as financial adviser to Sugar continued (972a-973a).

The method of selection of an investment banking firm to review and comment upon the revised Standard Research proposal was determined at the meeting of November 21. Defendant Sessel, a Milling designee on the Sugar Board, suggested that the Sugar Executive Committee, Messrs. Kemp, Bunker, Dorsey and Oxnard (all of whose association with Sugar antedated Milling's purchase of Sugar stock), pick any investment banking firm from among those whose names appeared in a newspaper advertisement for an underwriting in which there was

listed a number of investment banking firms (a so-called "tombstone" ad) (961a). The names of investment banking firms who had done some work for either Sugar or Milling were deleted from the list (961a). Kemp and Sessel were designated by the Board as a committee to retain the services of whatever banking firm was chosen by the Sugar Executive Committee (829a, 963a).

The Executive Committee met separately to review those names. They consulted with officials of Sugar's principal New York bank and then chose Kidder-Peabody & Co. (Kidder-Peabody), a well-known investment banking firm (962a-963a, 838a). Neither White nor any of the Milling designees on the Sugar Board had anything whatsoever to do with the selection of Kidder-Peabody (954a, 829a). The trial judge found Kidder-Peabody's credentials "impeccable" (Petition 37A).

Kidder-Peabody agreed to accept the assignment (837a, 840a) and proceeded to gather all of the available material and statistical services descriptive of the two companies. Its representatives spent several days in Denver talking to Kemp and the managements of both companies, and exploring the past and present performances and the future outlook for both companies. They obtained and studied financial figures, talked to the auditors of both companies, and studied all relevant matters (839a-841a).

Kidder-Peabody prepared a detailed written report respecting the fairness of the revised Standard Research plan to Sugar stockholders (842a, Exh. DCM-4, 23b, 1323a-1347a). The report was presented to and discussed with Kemp and Sessel (the special committee appointed by the Sugar Board) by representatives of Kidder-Peabody at a meeting in Denver, Colorado, about the middle of January, 1967 (842a). Kidder-Peabody advised that the Standard Research revised plan was generally sound but

that it needed to be improved in certain respects (843a). Kidder-Peabody recommended that the dividend on the Milling preferred stock to be given to Sugar common stockholders be increased from $1.80 to $1.87;* that a sinking fund be established to redeem this preferred stock; and that there be increases in the noncallable term and voluntary redemption price of that stock (844a, 845a). Kidder-Peabody advised that these changes would give the new preferred stock a greater market stability and a higher market value both immediately and over a period of time (845a).

Kemp distributed copies of Kidder-Peabody's report to all Sugar directors several days prior to the January 20, 1967 Sugar Board meeting (808a, 966a).

Representatives of Kidder-Peabody attended the January 20 Board meeting, where White met them for the first time (808a, 845a). All directors were present (809a). The Chairman of the Board of Kidder-Peabody reviewed the Kidder-Peabody report (810a) and his review was followed by discussions among the directors. Several of the directors asked questions. The questions were answered, and the modifications which Kidder-Peabody recommended to the revised Standard Research plan were explained. Kidder-Peabody's Chairman stated that in his opinion, this plan, with the changes Kidder-Peabody recommended to insure that the market values suggested by Standard Research would be attained, was eminently fair, and that he would recommend it to members of his own family or to anyone else who asked (810a, 971a). White stated that the Kidder-Peabody modifications were acceptable to Milling (810a).

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* Later increased to $1.88 to avoid fractions in quarterly dividend payments.

Thereafter, Kidder-Peabody's representatives withdrew from the meeting. The Board adjourned for lunch, with Messrs. Kemp, Bunker, Dorsey and Oxnard (the directors long associated with Sugar) and Holt going to lunch separately from the directors who were Milling designees (811a).

After lunch, Kemp stated that in his opinion the question of fairness of the plan had been resolved to his satisfaction by Kidder-Peabody (811a). Kemp also did state that the only remaining question in his mind was whether he as an individual felt that it was a good business transaction, *i.e.*, the merger of these two companies (811a-812a). At this point, Kemp asked White to retire with him for a private discussion. During that private discussion, in response to Kemp's questions, *White told Kemp that if Kemp felt that this merger was a bad business matter for Sugar, White was prepared, as a director of Milling, to use his every effort to terminate merger discussions and to dispose of the investment Milling had made in Sugar stock on a basis satisfactory to Sugar* (812a). White also assured Kemp as to the policies that Milling and he personally hoped to pursue (812a).

Thereafter, the directors' meeting reconvened and the Standard Research revised plan, as modified by Kidder-Peabody, was unanimously approved in principle (812a, 972a). Kemp and Bunker both voted for the plan. The latter testified (971a, 977a) that he believed the plan was fair to him as a Sugar stockholder. He and his wife then owned 7,300 shares of Sugar common stock (worth in excess of $250,000).

A short time after the approval of the merger in principle, Sessel advised Arthur Wadsworth, Executive Vice-President of Dillon, Read, with whom he was well ac-

quainted, that the directors of Milling and Sugar had approved a merger and were working on a proxy statement (553a). Sessel told Wadsworth that lawyers had advised him that Dillon, Read's verbal comments respecting earlier merger plans would probably have to be included in a proxy statement (554a). Sessel indicated that Sugar did not want to put those verbal comments in the proxy statement if they were no longer applicable either because the merger plan had been revised or because events had taken place which made Dillon, Read's earlier views no longer valid (554a). Dillon, Read had not seen or heard of Standard Research's revised plan, nor had it consulted with anyone concerned with the merger since late October, 1966. Sessel then sent the Standard Research revised plan to Wadsworth.

Some time later Wadsworth reported back to Sessel that after a cursory examination, Dillon, Read's judgment was that the revised plan still did not provide a sufficient equity interest for Sugar common stockholders (559a). Wadsworth stated that Dillon, Read was not in a position to give a written opinion that the Standard Research revised plan, as modified by Kidder-Peabody, was fair or that the revision and modification had effected a sufficient change in the prior plan to cause Dillon, Read's observations respecting that plan to be no longer applicable (588a-590a).

Wadsworth summarized Dillon, Read's position, stating (595a-597a):

> "There is one thing I would like to offer here which I think is important in fairness to both sides. Matters of this type are matters of opinion and there is every reason to believe that Kidder, Peabody believes their opinion and that our men believe their opinion, but that does not prove that one

side is necessarily right and the other is wrong, particularly in a case of this sort where the basic issue was that the offer obviously was at a very substantial premium over the going market value of the Great Western stock prior to the merger. And you can take the position that if a person is offered enough immediate cash appreciation he can sell the securities as Mr. Sessel said and buy General Motors or IBM or whatever. But for the man who is going to stay with the merged company, the equity participation in future growth is an important factor. But it depends on what the person wants to do, and I must say at some point a premium will persuade anybody to sell, whether they are going to participate in the future or not. That's the reason so many tender offers are used today. No participation obviously in the future—if you are offered a price above the market for cash you will accept it or reject it. So there are two points of view here. And it was basically that question of opinion on which this whole matter really rests."

Wadsworth made it absolutely clear that whether a merger's terms are fair or not is a matter of opinion about which even the experts differ (597a).

A summary of Dillon, Read's position had to be prepared for incorporation in the proxy statement to be sent to the shareholders of Sugar and Milling in connection with the stockholder meetings to be called to act upon the merger. Wadsworth and Treman of Dillon, Read were given that part of the proxy statement which covered Dillon, Read's participation and its views as to the plan as revised by Standard Research and Kidder-Peabody. It read (Exh. DCM-5, p. 8-9, 25b, 1359a-1360a):

"An earlier merger proposal prepared by Standard Research, under which the holders of Great Western common stock would have received three-tenths of a share of CM&E common stock and one share of a new CM&E preferred stock, was reviewed by the firm of Dillon, Read & Co. Inc. ('Dillon, Read') as financial advisor for Great Western. Although Dillon, Read did not render a formal report, it informally indicated that it felt the common stockholders of Great Western should receive a greater participation in the earnings and assets of the combined enterprise or other recognition of Great Western's contribution to such earnings and assets. The terms of the merger proposal thereafter were revised by Standard Research and were submitted to Kidder, Peabody. Kidder, Peabody suggested certain changes which were made and Standard Research and Kidder, Peabody then rendered their favorable reports referred to above.

"Before final action was taken by the Board of Directors of Great Western on the terms of the Merger described in this Proxy Statement, certain Directors of Great Western discussed the proposal with representatives of Dillon, Read with a view to ascertaining whether that firm was prepared to give its opinion with respect to the fairness of the proposal. After a preliminary review, Dillon, Read orally advised that it could not say that its reservations had been removed or express an opinion as to the fairness of the plan without a new analysis, taking into account, among other things, various developments which had taken place since its original study. After due consideration, the Board of Directors of Great Western decided to proceed on

> the basis of its knowledge of the facts and the opinions and reports of Standard Research and Kidder-Peabody. Accordingly, on April 12, 1967, after careful consideration of all available factors, the Board of Directors of Great Western approved the proposed mergers on the terms described in this Proxy Statement."

Treman of Dillon, Read, Petitioner's witness, testified that the proxy statement was accurate (454a, 482a) and that it fairly represented that Dillon, Read had further work to do, *e.g.*, Dillon, Read had not met Mr. Cross, who was then president of Sugar; Dillon, Read had not investigated the acquisition by Sugar of Shakey's, a food service company; Dillon, Read had not talked to the officers of Milling; and Dillon, Read had further investigating to do (427a).

Wadsworth characterized the proxy statement as a fair statement of Dillon, Read's participation (598a).

On April 11 and 12, 1967, the proposed merger agreement came before a meeting of the Board of Directors of Sugar, all members being present. Kidder-Peabody representatives and Sugar's special counsel were present during a portion of that meeting (814a). Counsel reviewed in great detail the specific terms of the proposed merger and all of the several documents that embodied those terms (815a). There was a lengthy discussion and there were many questions asked regarding specific terms of the merger, terms of debentures, terms of the preferred stock, dividend policies, and such (815a). The sinking funds were reviewed by counsel in great detail (816a). Kidder-Peabody representatives advised that all the technical details embodied in the final draft of the merger agreement were consistent in every way with Kidder-Peabody's rec-

ommendations as to fairness (816a). Since some of the directors had not been present at the January 1967 meeting because they had not been elected until after that meeting,* Kidder-Peabody brought everyone up to date on the affairs of both Milling and Sugar and again reviewed the business benefits of the merger (816a-817a). Defendant Maged reviewed the entire chronology of events relating to Dillon, Read and of the relationship of Dillon, Read to the transaction (818a). He told the directors of Dillon, Read's objections to the original Standard Research plan and of the several meetings between Dillon, Read and the various officials of Milling and Sugar (818a-819a). Maged or Sessel told of the conversations between Wadsworth and Sessel. Maged told the directors specifically that if they voted in favor of the merger they were doing so with the knowledge that Dillon, Read had advised that the prior plan was not adequate and that Dillon, Read might, but not necessarily, have reservations as to the fairness of the plan then before the Board (820a). Thereafter, after consideration and discussion among all the directors as to the effects of the merger

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* In February 1967 Bunker, being offered the presidency of Holly Sugar Company, a position which appealed to him because of the challenge and opportunity it presented, resigned as president of Sugar (974a, 995a). Kemp was disappointed by Bunker's resignation because Kemp, then 77 years old, had been hoping to "take it easy" and because the job of getting the merger organized and in operation would have then fallen to Kemp (993a). A few days later Kemp (and his long-time colleague Dorsey) resigned.

This created four vacancies on the Sugar Board of Directors, William M. White, Sr. having died in August, 1966. These vacancies were filled by the election of Melvin J. Roberts, president of Colorado National Bank of Denver, Robert J. Fisher and Lloyd T. Jensen, vice-presidents of Sugar, and Earl F. Cross (Exh. DCM-5, p. 2-3, 25b, 1354a-1355a).

upon Sugar and its stockholders, the Board of Directors approved the plan of merger, with Messrs. White, Maged and Cross (who were also directors of Milling) abstaining (821a). This meeting consumed two consecutive days, the merger agreement being approved on the second day (821a).

Thereafter both companies prepared a comprehensive proxy statement, which was mailed to shareholders of Sugar on or about August 15, 1967 (Exh. DCM-5, 25b, 1348a-1449a). It presented to the Sugar stockholders, as the trial judge found, a full, fair and complete disclosure of all information material to their consideration of the proposed merger (Petition 35A). The proxy statement told the stockholders that White, either alone or with Krentler, might be deemed to be in control of Milling as well as in control of Sugar (Exh. DCM-5, p. 2, 25b, 1353a) and described at page 3 under appropriate bold-face headings, the election of Milling's nominees as directors of Sugar (Exh. DCM-5, p. 3, 25b, 1354a). Milling's ownership of Sugar stock was spelled out in detail (Exh. DCM-5, p. 2, 25b, 1353a), as was Milling's acquisition of Sugar stock through the tender offer and the financing of the tender offer. The opinion and participation of Dillon, Read was described accurately, as confirmed by Dillon, Read itself (Exh. DCM-5, p. 8-9, 25b, 1359a-1360a). This lawsuit was mentioned, and there was a detailed recital of the allegations of the complaint (DCM-5, p. 27, 25b, 1378a), which had been filed in June 1967, before the proxy statement was distributed.

On September 15, 1967, the stockholders of Milling and Sugar overwhelmingly approved the merger at separate special meetings called to act upon the proposed merger. Under New Jersey law, the holders of shares of Sugar, whether common or preferred, were entitled to cast one vote per share in voting on the merger, and on this basis

the Sugar shares held by Milling represented only approximately 22% of the votes entitled to be cast on the merger. Thus the shares held by others than Milling represented approximately 78% of the votes entitled to be cast. The vote of Sugar stockholders on the merger was 1,579,535 (more than 94% of the shares voted) in favor and 94,317 opposed. Excluding the shares voted by Milling, the vote was 1,145,074 (more than 92% of the shares voted by the public stockholders) in favor and 94,317 opposed (70b). With respect to the public common stockholders alone, more than 92% of the common shares voted were in favor of the merger (71b).

On January 15, 1968, the merger was consummated and stock of the merged company has been actively traded on the New York Stock Exchange since that day.

This suit was commenced in June 1967 by Jane Levin, a common stockholder of Sugar. Subsequently other common stockholders intervened as plaintiffs. Neither plaintiff Levin nor any of the intervening plaintiff common stockholders had been stockholders of Sugar prior to Milling's tender offer for Sugar stock (102b).

Of the eleven hundred shares registered in the name of the plaintiff, Jane Levin, nine hundred are owned by her broker, who recommended the purchase to her after the Milling tender offer (61b-62b).

Reasons for Denying the Writ

I. The petition seeks review of the correctness of factual findings made by the District Court and affirmed by the Court of Appeals. This Court does not sit to review such factual findings.

II. This case is of no public importance, because the only disputes are as to the application of well-settled legal principles to the unique facts of this case.

III. This case raises no important question of federal law, nor is there any conflict among federal courts.

IV. The District Court and the Court of Appeals correctly resolved the factual issues involved, in accordance with the facts developed at the trial and the controlling legal principles.

(a) The conduct of defendants in negotiating and effectuating the merger plan was entirely proper.

(b) The proxy statement was a full, fair and complete disclosure of all material information.

(c) The terms of the merger were fair.

I

The petition seeks review of the correctness of factual findings made by the District Court and affirmed by the Court of Appeals. This Court does not sit to review such factual findings.

The issues present in this case and the conclusions reached by the District Court and the Court of Appeals are factual. Petitioner asserts facts and factual conclusions contrary to those found by both lower Courts and seeks here a third opportunity to have the facts established as she contends.

Petitioner argues that defendants (1) by means of "culpable conduct" in the form of a breach of their fiduciary obligations (2) brought about an unfair merger (3) through the use of a misleading proxy statement. But "culpable conduct", "breach of fiduciary duty", "unfair merger" and "misleading proxy statement" are all factual allegations, and their presence or absence are to be

determined from examination of facts in the record. This has been done by the District Court and by the Court of Appeals, and Petitioner's factual allegations have been twice rejected. As this Court said in *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178 (1938): "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." Particularly is this so where the decision on these points rests on similar findings of two Courts, which are not to be disturbed unless plainly without support. *General Talking Pictures Corp.* v. *Western Electric Co., supra; U. S.* v. *Chemical Foundation*, 272 U. S. 1, 14 (1926).

Petitioner suggests (Petition 17-18) that the Court of Appeals did not give adequate consideration to her contention that defendants' conduct was in breach of their fiduciary obligations and violated Section 10(b) of the Securities Exchange Act of 1934. Petitioner states that her contention was disposed of in a single sentence without discussion. On the contrary, the Court of Appeals, through four pages of its opinion, recited in detail the actions of the defendants in the negotiation and effectuation of the merger (Petition 3A-6A). Thereafter (Petition 15A) the Court of Appeals stated its conclusion that the facts in the record belied Petitioner's contention of a breach of fiduciary obligation.

The trial judge, who had the opportunity to observe the principal individual defendants on the witness stand, concluded that "good faith was the motto throughout" (Petition 37A) and that defendants in good faith "sought a merger that would be fair to everyone concerned" (Petition 37A).

Petitioner's allegation that defendants violated their fiduciary duties was specifically rejected by both the trial

court (Petition 39A) and by the Court of Appeals (Petition 15A). Both Courts approved the proxy statement, and both Courts found the terms of the merger fair. Thus, Petitioner asks this Court to review the factual findings and inferences concurred in by the District Court and the Court of Appeals. As this Court does not sit for such purposes, the Petition should be denied.

II

This case is of no public importance, because the only disputes are as to the application of well-settled legal principles to the unique facts of this case.

This lawsuit raised two questions: whether the defendants' conduct constituted a breach of fiduciary duty and whether the terms of the merger were fair. Both questions were decided by the Courts below by the application of well-settled legal principles to the facts as found by those Courts. As to the question of whether defendants breached a fiduciary duty, Petitioner herself argues (Petition 18-19) that the legal standards to be applied in resolving this question are made clear by decisions of this Court, and with this we agree. There is no dispute as to the long and well-established rules of conduct for fiduciaries pronounced in the cases cited by Petitioner in support of her argument.* The lower Courts have ruled that defendants complied with these rules. It seems clear beyond doubt, therefore, that review by this Court of the unique factual situation of this case would add nothing of value or concern to anyone except the litigants themselves.

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* *Twin-Lick Oil Company* v. *Marbury*, 91 U. S. 587 (1876); *Geddes* v. *Anaconda Copper Mining Co.*, 254 U. S. 590 (1921); *Pepper* v. *Litton*, 308 U. S. 295 (1939); *Meinhard* v. *Salmon*, 249 N. Y. 458, 164 N. E. 545 (1928).

As to the second question (the fairness of the merger terms) it seems obvious that no other merger will ever take place involving the same terms or involving the same parties or other parties whose operations, prospects, management and values are the same as those of the parties to this merger. Further review of the fairness of the terms of this merger would add nothing of value or concern to anyone except the litigants. It is primarily an issue of fact, and to the extent that it is suffused with questions of law, it is state law.

Thus, the rule that this Court does not sit for the benefit of particular litigants (*Rice* v. *Sioux City Cemetery*, 349 U. S. 70, 74 (1955); *Magnum Co.* v. *Coty*, 262 U. S. 159 (1923)) should be applied and the Petition denied.

III

This case raises no important question of federal law, nor is there any conflict among federal courts.

There is no important question of federal law at issue in this case. There is no dispute that, to quote Petitioner's words (Petition 17), "directors of a public corporation may not, under the federal securities laws, engage with impunity in" conduct which is fraudulent as to stockholders. The District Court and the Court of Appeals recognized this standard of fiduciary responsibility and decided, on the basis of the facts and the inferences drawn after observation of the principal individual defendants as witnesses, that the activities of the defendants were entirely proper and did not contravene that standard.

Petitioner also maintains that the question which she has raised as to the adequacy of the proxy statement pre-

sents an issue similar to that involved in *Mills and Susman* v. *The Electric Auto-Lite Company,* 403 F. 2d 429 (7 Cir. 1968), cert. granted 89 S. Ct. 1470, 4/21/69, and that there is a conflict between the Court below and the Court which decided the *Mills* case.

There is absolutely no conflict between the *Mills* decision (or, we submit, whatever decision this Court may subsequently render in the *Mills* case) and the decision of the Court of Appeals in the instant case. In the *Mills* case it was not seriously disputed, and both lower Courts found, that the proxy statement there involved was misleading as a matter of law. In the instant case, both the District Court and the Court of Appeals properly found that the proxy statement was a full, fair and complete disclosure of all material information. (See Point IV, *infra.*) Thus the issue which this Court will resolve in the *Mills* case, namely, the necessity for proof that the misleading proxy statement caused stockholders to vote in favor of the merger, is simply not present here, the Courts below having found that there was no infirmity in the proxy statement.

Petitioner also asserts (Petition 24) that the proxy statement herein is defective in the same respect that the *Mills* proxy statement was defective. Petitioner's assertion is made for the first time in her petition for *certiorari,* was not raised below, and is patently false. The *Mills* proxy statement was found defective because it failed to inform stockholders adequately of the possible adverse interests of those soliciting the proxy. The proxy statement herein told the stockholders at page 2 that White, either alone or with Krentler, might be deemed to be in control of Milling as well as in control of Sugar (Exh. DCM-5, p. 2, 25b, 1353a) and described at page 3, under appropriate boldface headings, the election of Milling nominees as directors of Sugar (DCM-5, p. 3,

25b, 1354a). Milling's ownership of Sugar stock was spelled out in detail, as was Milling's acquisition of Sugar stock through the tender offer and the financing of the tender offer (DCM-5, p. 2-3, 25b, 1353a-1354a). Thereafter, at page 5 (DCM-5, p. 5, 25b, 1356a) management's recommendation appeared. This was full and complete disclosure, as both lower Courts found.

IV

The District Court and Court of Appeals correctly resolved the factual issues involved in accordance with the facts proved at the trial and the controlling legal principles.

A. The conduct of defendants in negotiating and effectuating the merger plan was entirely proper.

Both the District Court (Petition 27A-35A) and the Court of Appeals (Petition 3A-6A) reviewed in detail the history of the merger negotiations from their inception in September 1966 to the approval by the stockholders on September 15, 1967. Both lower Courts reviewed the various plans of merger which had been suggested, the numerous meetings at which these plans were considered, the progressive improvement in the terms of the exchange for Sugar stock, the steps taken by the financial consultants in their review, the actions taken by the directors of both companies in approving the final terms of the merger, and the shareholder vote in approving the merger. The District Court expressly found that the defendant directors acted in good faith in seeking a merger that would be fair to everyone concerned (Petition 37A), that the retention of Kidder-Peabody and suspension of Dillon, Read were entirely proper (Petition 38A), and that the defendants in no way violated their fiduciary du-

ties (Petition 39A). These findings were all affirmed by the Court of Appeals (Petition 15A).

A detailed review of the extensive record in this case is not necessary to demonstrate that there was not only sufficient but abundant evidence to support these findings of fact by the lower Courts. The counter-statement of the facts contained herein as well as the statements of facts in the lower Courts' opinions clearly demonstrate that their findings of fact are correct and supported by the record.

B. The proxy statement was a full, fair and complete disclosure of all material information.

In Point II of her petition (Petition 23), Petitioner argues that the decision below denies relief for inadequate disclosure in the merger proxy statement, citing *SEC* v. *National Securities, Inc.*, U. S. , 89 S. Ct. 564 (1969) and *Mills and Susman* v. *The Electric Auto-Lite Company, supra.* In both those cases, however, the trial court had found that there was a misleading proxy statement, whereas, in the instant case, the District Court found that the proxy statement presented to the stockholders "full, fair, and complete disclosure of all information material to their consideration of the proposed merger" (Petition 35A), and the Court of Appeals found "without merit" Petitioner's allegation of failure on the part of defendants to disclose material information in the Sugar proxy statement (Petition 15A). The proxy statement at page 2 (DCM-5, p. 2, 25b, 1353a), under appropriate bold-face headings, pointed out that Milling "may be deemed to be in control of Great Western" and at page 3 (DCM-5, p. 3, 25b, 1354a) detailed the election of Milling nominees as directors of Sugar. Thereafter, at page 5 (DCM-5, p. 5, 25b, 1356a) management's recommendation appeared. Such disclosure, clearly and prom-

inently presented, was designed to and did inform the stockholders, unlike the disclosure in the proxy statements involved in the *Mills* and *National Securities* cases, *supra*.

The merger was thoroughly considered and studied, as evidenced by the course of negotiation of the merger terms, the numerous meetings and discussions and the detailed analyses prepared and presented by the financial experts. Petitioner's argument to the contrary (Petition 25-¶2) ignores all these facts and concentrates on one isolated and out-of-context statement.

Petitioner challenges the statement that "the combined enterprise will have the benefit of increased total resources" (Petition 25-¶3). Petitioner's challenge is ill-founded, since the total assets of the merged company (the "combined enterprise") were the sum of the separate assets of Milling and Sugar prior to the merger (Exh. DCM-5, p. 15, 25b, 1366a).

Greater depth of management would clearly result from the merger of the two companies into a single entity, and the merger would permit the allocation of the resulting management resources to the combined enterprise as the demands of the business might require. Petitioner's argument to the contrary (Petition 25-26, ¶4) is simply not supported by the record.

Petitioner's allegation (Petition 26, ¶5) that the proxy statement omits entirely any reference to the alleged culpable conduct of the director defendants is without significance in view of the findings that there was no culpable conduct.

Accordingly, none of the alleged deficiencies in the proxy statement set forth by Petitioner (Petition 24-26) is supported by the record and each is negated by the findings of the lower Courts.

C. The lower Courts properly found the terms of the merger to be fair.

Petitioner argues (Petition 27) that it is improper under Section 10(b) of the Securities Exchange Act of 1934 to use the legal standards of the so-called "business judgment" rule in appraising the fairness of the merger terms and that the correct rule is that the "merger must be set aside if it is in the slightest degree unfair or fails to carry the ear-marks of an arms' length bargain" (Petition 27). The fallacy in Petitioner's argument is that the lower Courts did not apply a so-called "business judgment" rule but applied the stricter standard sought by Petitioner. The District Court said (Petition 50A):

> "The Court's role in assessing the fairness of a plan of merger is to consider whether the plan is to the slightest extent unconscionable or calculated to be discriminatory. The court finds this was not the case."

and:

> "The standard for determining breach of fiduciary duty in the present context is to determine—as in the case of a sale by a director of, say, property to his company—whether the company could have gotten a better deal on the marketplace. In the present context, the 'marketplace' standard is the standard of 'arms-length negotiation' between the director and his company, and it is to be determined, in assessing whether a director has breached his fiduciary duty, whether the merger plan arrived at in the present case approximates one that would have been arrived at through 'arms-length negotiation.' Because it is the court's view that the

> final merger plan was of a similar nature to what would have likely resulted in the merger 'marketplace,' it is also the court's view that the defendant directors have not violated their fiduciary duties to SUGAR." (Petition 39A)

The question as to the fairness of the merger terms was not left to the business judgment of the directors but was independently and exhaustively evaluated, under strict legal standards, by both lower Courts. In addition, both the District Court and the Court of Appeals, citing *Brundage* v. *New Jersey Zinc Co.*, 48 N. J. 450, 226 A. 2d 585 (1967), placed upon defendants the burden of proving that the terms of the merger were fair.

The recognition by the Court of Appeals that "it is most difficult to pass on the issue of fairness where the caliber of management and corporate growth potential form such a large basis for justification of the merger" (Petition 14A), in no way detracts from the finding of fact that the merger was fair. It is exactly this type of determination, requiring the weighing of complex intangible factors involving matters of credibility, which is not to be reviewed on appeal. See *Berenyi* v. *District Director,* 385 U. S. 630 (1967).

Thus, Petitioner is wrong when she argues that the lower Courts applied the wrong legal standard in finding the merger terms fair. Both the District Court (Petition 40A) and the Court of Appeals (Petition 17A) followed *Brundage* v. *The New Jersey Zinc Co., supra,* in which the standards of director conduct enunciated in *Twin-Lick Oil Company* v. *Marbury,* 91 U. S. 587 (1876) and *Geddes* v. *Anaconda Copper Mining,* 254 U. S. 590 (1921) (relied upon by Petitioner) were approved. The District Court and Court of Appeals not only analyzed

the financial aspects of the merger, such as the dividends, earnings per share and market values of the securities to be issued and those to be surrendered, but also considered many intangible factors such as: the overwhelming independent stockholder approval of the merger (Petition 6A); the generally increasing trend of Milling's earnings compared to the decreasing trend of Sugar's earnings (Petition 9A-10A); the excellent future growth prospects for Milling compared to the limited growth prospects for Sugar as a result of federally-imposed sugar quotas (Petition 10A); the priority of the position of the Sugar stockholders resulting from the receipt of preferred stock (Petition 10A-11A); and the advantage of the guaranteed dividend payments adhering to that preferred stock (Petition 11A).

The allocation of a package consisting of both preferred and common stock to the Sugar common stockholders, including Petitioner, put them in an assured and preferred dividend position while still retaining for them some participation in the growth of the Company, if such occurred. The allocation of only common stock to the Milling stockholders, however, placed upon them virtually all of the risks. Finally, the terms of the merger fully met the requirements for Sugar stockholders which John Bunker, Sugar's president and himself a substantial common stockholder, had stated to White (932a-934a).

CONCLUSION

There is no dispute as to the applicable legal principles. Indeed, the lower Courts applied the same legal standards that Petitioner asserts. Petitioner is dissatisfied with the results reached by both lower Courts, after application of the correct legal standards to the facts. Under such circumstances, the Petition should be denied.

Respectfully submitted,

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